single count of it,may be so framed with a double, treble, or any number of aspects, looking to so many distinct and incongruous causes of action, in order to hit the exigencies of the plaintiff's case or any possible demands of his proofs at the trial, we must say, strikes us as something exceedingly novel in the rules of pleading. We do not think it is the law, and, unless the legislature compels us by some new statutory regulation, shall hereafter be very slow to change this conclusion."

In view of the statement in the syllabus of the principal case that under the code all distinctive forms of civil action are abolished and which seems to be relied upon as a basis for the decision, we may be justified in quoting further from *Supervisors of Kewaunee County* v. *Decker* as follows: "We have often held that the inherent and essential differences and peculiar properties of actions have not been destroyed, and from their very nature cannot be. * * * These distinctions continuing, they must be regarded by the courts now as formerly, and now no more than then, except under the peculiar circumstances above noted, can any one complaint or count, be made to subserve the purposes of two or more distinct and dissimilar causes of action at the option of the party presenting it. It cannot be 'fish, flesh, or fowl' according to the appetite of the attorney preparing the dish set before the court. If counsel disagree as to the nature of the action or purpose of the pleading it is the province of the court to settle the dispute. It is a question when properly raised which cannot be left in doubt, and the court must determine with precision and certainty upon inspection of the pleadings to what class of actions it belongs or was intended, whether of tort, upon contract, or in equity, and, if necessary or material, even the exact kind of it within the class must be determined."

Evidently should the plaintiff state that he relies upon contract and afterwards seek to recover upon tort, the Wisconsin court would not consider the statement immaterial even though it was mistakenly made.

In this comment we have not overlooked the fact that the demurrer sustained by the court below was interposed to the *evidence*; and it is admitted that *Supervisors of Kewaunee County* v. *Decker* recognizes a difference in the situation when the question arises after issue joined upon the merits and that presented when it arises upon demurrer to the complaint; and, hence, no criticism is offered respecting the conclusion reached in the case. Our purpose is only to challenge the sweeping statements of the syllabus and of the opinion. T. A. B.

SUBROGATION TO A LIEN FOR ASSESSMENTS OR TAXES—CONSTRUCTION OF THE NEGOTIABLE INSTRUMENTS LAW.—The right of a person ever to claim subrogation to the rights of the state as respects a lien for taxes has been doubted, but whether such right has ever been denied independent of other consideration, such, for example, as the acceptance of something in lieu of cash, does not clearly appear. Such doubt was expressed in *Mercantile Trust Company* v. *Hart,* 76 Fed. 673, 22 C. C. A. 473, 35 L. R. A. 352, and in *Wallace's Estate,* 59 Pa. St. 401. In the former of these cases the tax collector, the county treasurer, accepted checks in payment of taxes due the

state of Colorado, the city of Denver, and the board of education of said city. The checks turning out to be worthless and their drawers insolvent, the tax collector, appellee, intervened in a suit brought by the complainant to foreclose a deed of trust, in the nature of a mortgage, and prayed that he might be subrogated to all the rights of the state of Colorado, the city of Denver, and the board of education of said city, as if said taxes had neither been paid nor receipted for, and that the lien declared in his favor might be adjudged to be superior to that of the mortgage bondholders, and that said lien might be satisfied out of the current income of the mortgaged property; in the latter of these cases, taxes due from a property owner had been advanced and paid by the collector of taxes, and subsequently the owner, had confessed a judgment in favor of the collector for the taxes so advanced. The collector claimed the right to be subrogated to the lien of the state. The right to subrogation was denied in both cases. THAYER, J., in the former case intimated that it might well be doubted whether a person could ever claim subrogation to the rights of the state as respects a lien for taxes. Is the doubt thus suggested supported by the authorities? The precise question recently came under the review of the New York court of appeals in two cases: *Title Guarantee & Trust Company* v. *Haven et al.*, 89 N. E. 1082, case No .1; Id. 1085, case No. 2, and with that question was connected the proper construction of that provision of the negotiable instruments law, reading as follows: "The acceptor * * * admits the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument." N. I. L. § 64 (Mich.). Both questions are deemed of such general interest to the profession as to warrant special attention being drawn to their consideration in the cases last above cited. The facts material to be considered are these: The defendants were the owners of certain lands in the city of New York, acquired by devise, which were subject to a lien for assessments by the city of New York in the sum of $9,953.83 for regulating and grading an avenue. The owners agreed to sell said lands free and clear of all liens and incumbrances. Under the contract of sale, payment was to be made in three instalments. Before the last payment on the land, the assessments were paid by means of a check for the amount thereof, drawn upon the plaintiff, corporation, to the order of the collector of assessments and arrears of New York city. The defendants had no concern with said payment. The check purported to be signed by William O. Green, trustee, who had authority to draw checks against a deposit with the plaintiff to the credit of the estate of Andrew H. Green. The check was forged, but the plaintiff paid it, believing it to be genuine. There was no evidence as to the identity of the forger or that the defendants had any knowledge, until after the event, of the payment of the assessments by means of the check. After ascertaining the forgery, the plaintiff restored to the credit of the estate of Andrew H. Green, in its deposit account, the amount of the forged check, which had previously been charged against it. Upon these facts the plaintiff brought this suit (Case No. 2), praying judgment that upon the payment of the assessments the plaintiff became subrogated to the lien of the assessments upon the lands subject thereto, that such lien remains in

full force as between the parties to the action, that the lien attached to the moneys received by defendants as the purchase price, which in equity represents the land, and that the plaintiff recover the amount of the assessments from the defendant.

The defendant resisted the plaintiff's claim, first, on the ground that, having paid the check, it was estopped, by the provision of the negotiable instruments law above quoted from disputing the validity of said check, and, second, that in no event could it be subrogated to the lien of the city for assessments, because subrogation as to such liens was discountenanced by the law. As to the first defense, the court held that the provision of the negotiable instruments law above quoted is merely declaratory of the common law and the common law rule that he who accepts a negotiable instrument, to which the drawer's name is forged, is bound by the act and can neither repudiate the acceptance nor recover the money paid, is the rule of the statute. *Price* v. *Neal*, 3 Burr. 1354; *National Park Bank* v *Ninth National Bank*, 46 N. Y. 77, 7 Am. Rep. 310. Neither rule has any application in behalf of one who has acquired the paper in the absence of any consideration therefor either present or past. The forged check in suit was not given in payment of any existing or antecedent indebtedness either on the part of the drawer, estate, or on the part of the forger. And so it was held that the provision of the statute, upon which defendant's first defense was based, "has nothing to do with the question." Consequently there was nothing in the law of commercial paper which constituted an obstacle to the plaintiff's recovery.

The theory upon which the plaintiff brought its suit was that the payment made by it, operated as between the defendants and the city, to discharge the city's lien which rested upon the defendant's land, that the lien under the circumstances was still alive for its benefit and, inasmuch as the defendants had conveyed away the land, the lien was transferred to and attached to the proceeds of the land in the hands of the defendants. The court disapproves those holdings referred to in the beginning of this note and declares them to be unsupported by authority. In support of its conclusion that the plaintiff is entitled to be subrogated to the lien of the city for the assessments discharged by its payment of the forged check, the court cites with approval: *Cockrum* v. *West*, 122 Ind. 372, 23 N. E. 140; *Sharp* v. *Thompson*, 100 Ill. 447, 39 Am. Rep. 61; *McNish* v. *Perrine*, 14 Neb. 582, 16 N. W. 837; *John* v. *Connell*, 61 Neb. 267, 85 N. W. 82; *Fiacre* v. *Chapman*, 32 N. J. Eq. 463. The case of *Emmert* v. *Thompson*, 49 Minn. 386, 52 N. W. 31, is of like effect.

It thus appears from what is apparently the great weight of authority that there is nothing in the nature of a lien for taxes or assessments or in the fact that such lien exists in favor of a sovereign taxing power to prevent the equitable doctrine of subrogation, when justice demands it. But there are limitations upon the right of subrogation. One who claims the right must make it appear that he has not officiously interfered with the affairs of the defendant. He must show as a condition precedent, that granting it would not prejudice the rights of innocent third parties.

In the case which is the subject of this comment, case No. 2, the lien of the city of New York was terminated as to the city by the payment of the assessments, nevertheless it could be regarded as still existent for the purpose of doing justice between the party who had paid them and the owners of the land. The land having been converted into money in the pockets of the defendants, the lien attaches to the money and is enforceable against it. The conclusion thus reached is predicated upon the assumption that the payment of the assessments was purely gratuitous and in no wise in discharge of any real or supposed obligation on the part of the estate of Andrew H. Green or of the unknown forger, but was brought about solely by the mistake induced by the forgery. Case No. 1, *supra,* is in all respects the same as case No. 2, *supra,* save that the taxes had been levied within the lifetime of the defendants' testatrix and were for her personal debts chargeable against her estate; wherefore the money represented by the forged check could not be regarded as having been applied to relieve the devised premises from the lien. This fact differentiates case No. 1 from case No. 2. The equitable doctrine of subrogation was held unavailable to the plaintiff under the facts in case No. 1. R E. B.

WHAT ARE THE RIGHTS OF THE VENDOR OF GOOD WILL?—Various attempts have been made to answer this question by defining the term "good will" and in this way determining what passes to the vendee and, *e converso,* what rights are left to the vendor. Lindley, however, says, "the term good will can hardly be said to have any precise signification." LINDLEY-EWELL, 2nd Ed., 439. Though indefinable the term is said to be divisible, as in the case of *Foss* v. *Roby* (1907), 195 Mass. 297 ,where it is said, following previous decisions, that in a commercial partnership the good will is largely local in character whereas in a professional partnership it follows the person not the place. The courts have attempted to answer the larger question by resolving it into a number of smaller ones based on the varying states of fact. May the vendor set up again in a similar business? Answered in the affirmative in *Churton* v. *Douglas* (1859), 1 Johns, 174, 188. May he advertise? Answered in the affirmative in *Cottrell* v. *Manufacturing Co.* (1886), 54 Conn. 138. May he solicit old customers? Answered in the negative in *Trego* v. *Hunt* [1896], 1 A C. 7. The decision in this last case has been frequently quoted as the English Rule The case of *Williams* v. *Farrand* (1891), 88 Mich. 473, had said the retiring partner might solicit old customers, though in this case only "the right, title and interest" had passed, good will not being expressly mentioned.

A recent Massachusetts case, *Marshall Engine Co.* v. *New Marshall Engine Co.* (1909), 89 N. E. 548, answers this question without reference to the so-called English Rule, above referred to, and also without appealing to any of the American cases which are spoken of as being directly opposed to the principle of the English Rule.

The facts of the Massachusetts case are somewhat complicated but the real defendant is one F. J. Marshall who, in September, 1902, sold to the plaintiff corporation, called the Marshall Engine Co., the "good will of the